REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

PETITION NO. 6 OF 2017

KEN T. SUNGU …….....PETITIONER

VERSUS

KENYA PORTS AUTHORITY...……....RESPONDENT

R U L I N G

INTRODUCTION

1. The application before me is the Notice of Motion dated 5/5/2017. It is brought under rule 4,3,19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamentals Freedoms) Practice and Procedure Rules 2013 and all the other enabling provisions of the law. It seeks the following orders:

a. That pending the hearing of this instant application interpartes, the honourable court do issue a temporary injunction restraining the respondent either by himself through his agents and/or servants from recalling/redeploying/releasing the petitioner from the Department of Security to any other Department of the respondent.

b. That in the alternative pending the hearing of the application interpartes the honourable court do issue conservatory order restraining the respondent either by himself through his agents and/or servants from recalling/redeploying/releasing the petitioner from the department of Security to any other Department of the respondent.

c. That pending the hearing of this application interpartes, the honourable court do issue a conservatory order restraining and/or preventing the respondent either by itself or through its agents and/or servants from withholding any payments and/or allocations properly due and owing and/or payable to the petitioner.

d. That pending the hearing and final determination of the Constitutional Petition filed herein, this court do issue conservatory order restraining and/or prerogative of prohibition do issue restraining the respondent either by himself through his agents and/or servants from recalling/redeploying/releasing the petitioner from the department of Security to any other Department of the respondent.

e. That pending the hearing and determination of the Constitutional Petition filed herein this honourable court do issue a conservatory order restraining and/or preventing the respondent either by itself or through its agents and/or servants from withholding any payments and/or allocations properly due and owing and/or payable to the petitioner.

2. The Motion is however opposed by the respondent vide her replying affidavit sworn by Mr. Boaz Ouko on 29/5/2017.

APPLICANT'S CASE

3. Mrs Nyange, learned counsel for the Applicant relied on the applicant's said affidavits to prosecute the motion. It is the applicant's case that he received the letter dated 18/4/2017 redeploying him from his Security Services Department to the Human Resource Department. That he was not consulted before the redeployment as required under Section 10(5) of the Employment Act and that in any case the purported "redeployment" is strange and it does not appear anywhere in the respondent's HR manual.

4. The claimant further contends that he has never sought employment in the HR Department of the respondent or any other but in the Security Services Department where he has acquired wide experience and specialized training at the expense of the employer. That although initially he got letter dated 18/4/2012 transferring him to the HR Department, on 31/5/2017, he received yet another letter dated 27/4/2015 transferring him to the Bandari College as Assistant Training Officer Grade HM3(Supernumerary) in accordance with the resolution of the Respondent's Board.

5. In view of the foregoing matters, the applicant submits that the said redeployment/transfer to a different department from the department where he was appointed to serve is unfair, unlawful and an affront to his rights to fair Administrative Action, fair hearing and fair Labour practice as enshrined under Article 41, 47 and 50 of the Constitution. He therefore prayed for the conservatory orders to issue as prayed pending the hearing and determination of his Petition.

RESPONDENT'S CASE

6. Mrs. Ikegu, learned counsel for the respondent opposed the Motion by relying on the Replying Affidavit by Mr. Boaz Ouko. She submitted that the Applicant has not proved the essential elements for the grant of interlocutory injunction as enunciated in the ***Giella vs Caseman Brown case.*** She submitted that the applicant has not proved that he has a prima facie case with probability of success. She cited ***ELRC 643 of 2015 Kenya Aviation Workers Union vs Bollore Africa logistics [k] and another [2016] e KLR*** where Mbaru J, followed the Court of Appeal decision in ***Mrao ltd vs First American Bank of Kenya ltd & 2 others*** to urge that the applicant has not proved that he has a right which was infringed, and that he has high chances of success upon trial.

7. She submitted that under Section 10(3) (d) of the Employment Act, the employer has a right to vary the terms of a contract of employment provided that she notifies the employee of the variation in writing. That the Act and the constitution grants the employer the prerogative to make organizational changes. According to her, the respondent complied with the Section 10(3) (d) of the Act by serving the redeployment/transfer letters on the applicant and therefore she denied that article 47 and 50 of the constitution were breached through the action of transfer/redeployment.

8. She further submitted that under Clause H.6 of the respondent's Disciplinary Handbook, the applicant ought to have appealed against the transfer and not rush to the court as he did. She urged that the suit is prematurely before the court because it was brought before the claimant fully exhausted the internal dispute resolution mechanisms. She further urged that the Motion is also overtaken by events because the transfer letter took effect before the filing of the suit and before obtaining the interim orders on 5/5/2017. She therefore submitted that the order sought has the effect of reversing the transfer and ordering Specific performance which is highly discouraged under Section 49(4) of the Employment Act except where there exists special circumstances. According to the counsel, the applicant has not demonstrated any special circumstances to warrant the order of specific performance.

9. Turning to the second element for grant of interlocutory injunction, the defence counsel submitted that the applicant will suffer no irreparable harm if the order is denied because he has not lost his rank, benefits and emoluments as a result of the transfer. That even if he will prove any loss during trial, the same will be determinable. As regards the fear to lose office in the Bandari Sacco due to the transfer, the

counsel submitted that Sacco matters are not part of the terms of the employment contract.

10. Finally, the defence counsel submitted that the balance of convenience favours the respondent because her statutory and constitutional prerogative to transfer her employees cannot be defeated. In addition she submitted once again that the suit was premature and should have waited for exhaustion of the internal dispute resolution mechanism.

APPLICANT'S REJOINDER

11. The applicant's counsel submitted that the transfer was done without prior consultation and the issues of integrity alleged in the replying affidavit were matters which had been resolved and the related correspondences had since been expunged from the HR records after the lapse of 365 days from the date they were made. She further submitted that the applicant had since been promoted. She concluded by urging that the balance of convenience favours the applicant because the transfer was done without prior consultation.

ANALYSIS AND DETERMINATION

12. There is no dispute that the applicant applied for the job as a security officer and that he was recruited as such and has since acquired a lot of training and experience in that area. There is also no dispute that the respondent in exercise of her managerial prerogative transferred or redeployed the claimant from the Security Services Department to the HR department on 18/4/2017 and again to the Bandari College on 27/4/2017 as Assistant Training Officer. The main issue for determination herein is whether the applicant has met the threshold for granting interlocutory injunction as laid down by the Giella vs Caseman Brown namely:

a. Has established a prima facie case with probability of success.

b. Has demonstrated the likelihood of suffering an irreparable harm if the order is denied.

c. Has demonstrated that the balance of convenience favours him.

Prima facie case with probability of success

13. In the ***Mrao Case***, the Court of Appeal defined a prima facie case as follows;

because it was done without his consultations as required under Section 10(5) of the Employment Act. Section 10(5) of the Employment Act provides as follows:

> ***"Where any matter stipulated in subsection (1) changes, the employer shall in consultation with the employee, revise the contract to reflect the change and notify the employee of the changes in writing."***

16. The respondent has however contended that she has the prerogative to transfer/redeploy her employees to other departments under Clause B.14 of her HR Manual and Section 10 (5) of the Act and the Constitution of Kenya. I have carefully considered the said HR Manual and the law. Clause B.14 partly states as follows:

> ***"(a) ….***
>
> ***(b) Interdepartmental transfer in respect of employees in Grades HM3 and below shall be approved by the GM-HRA.***
>
> ***(c) …***
>
> ***(d) Notwithstanding the above provisions, in all cases of inter-departmental transfers, consultations shall be made with their respective Divisional/Department Heads."***

17. The analysis of the foregoing excerpt from the HR Manual and section 10 of the Act with respect to the aforesaid questions, forms the core of the dispute in the Petition herein since the final reliefs sought in the Petition are basically a conversion of any injunction granted at this stage into permanent injunction. Consequently I have formed the opinion that, the determination of the rights of the parties herein, the breach of the said rights, and the redress thereof should await trial. The reason for the foregoing being that going ahead to determine the right of the parties before trial may be prejudicial and an affront to the right to fair hearing.

Irreparable harm

18. Irreparable harm basically refers to an injury which cannot be adequately compensated by an award of damages. The respondent contended that no irreparable harm has been demonstrated by the applicant. That the alleged fear to lose his representative positon to the Bandari Sacco is not part of his employment contract. That this being an employment dispute, if the applicant will prove any injury, the same will be determinable and therefore will not suffer irreparable loss.

19. The applicant has deposed in his supporting affidavit that the impugned transfer will extremely prejudice him because his career as a security officer will be prematurely ended and his investment in security related studies will be rendered a waste. In addition the applicant contended that the personal satisfaction and gratification derived from performing the security duties will be taken away from him.

20. After considering the rival submissions by the two parties, I agree with the respondent that the applicant has not demonstrated any irreparable harm. He is still in his job Grade and his benefits and emoluments are intact. If any loss will be suffered, the same will be determinable upon trial. As regards loss of value of the experience and knowledge acquired by the applicant through training and long service in the security department, and the loss of his personal satisfaction and gratification which he derives from performing security duties, that will also be a matter for proof during trial.

Balance of convenience

21. The balance of convenience favours the respondent because prima facie she enjoys managerial prerogative in managing her affairs as well as her resources. The applicant has not demonstrate bad faith on the part of the employer in transferring him. It is therefore not for the court to injuct employers from exercising their mandate until it is proved by evidence that she has acted in bad faith and/ or in breach of

the law. That will also await determination after trial.

DISPOSITION

22. The Notice of Motion dated 5/5/2017 is dismissed with no costs. I further make the following directions:

a. That the applicant proceeds to report to his new station on Monday 19th June 2017 at 8.30 AM and continue working until the hearing and determination of his petition.

b. The respondent will not victimize the applicant in any way after he reports to the new work station.

c. The petition shall be heard on priority basis within this month of June 2017.

Dated, signed and delivered this 16th June 2017

O. N. Makau

Judge